IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 935 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MADHUBHAI NARANBHAI

Versus

STATE OF GUJARAT

Appearance:

MS RV ACHARYA for Appellants

MR IM PANDYA, APP for Respondents

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 16/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 ('the Code' for short) is directed against judgment dated September 25, 1998 rendered by the learned Additional Sessions Judge, Surat in Sessions Case No.292 of 1995 by which the appellants are convicted of the offences punishable under Section 302 read with 34 I.P.C., Section 323 read with 34 I.P.C. as well as Section 325 read with 34 I.P.C. and each sentenced to suffer R.I. for life and fine of Rs.500/-, in default, S.I. for 30 days for commission of offence punishable under Section 302 read with 34 I.P.C. as well as R.I. for six months for commission of offence punishable under Section 323 read with 34 I.P.C. and R.I. for one year and fine of Rs.200/-, in default, S.I. for 15 days for commission of offence punishable under Section 325 read with 34 I.P.C. It may be stated that the learned Judge has directed that the substantive sentences shall run concurrently and that the convicts shall be entitled to benefit of set-off, as provided in Section 428 of the Code.

2. The prosecution case, as emerging from the record, is as under:

2.1 Complainant Vanitaben, wife of Chandubhai Naranjibhai Choudhary, is residing in Vania Falia of village Katifaliya, Taluka Bardoli. During the subsistence of her marriage with her deceased husband, she gave birth to a girl child named Pushpaben. Just opposite her house, house of her husband's elder brother i.e. Jamsibhai Naranjibhai is situated. Near the house of Jamsibhai, houses of her husband's another elder brother namely Madhubhai Naranjibhai and her husband's younger brother namely, Dhirubhai Naranjibhai are situated. Her father-in-law had partitioned the properties including trees during his life time and given respective share to each of his sons. Just behind the house of the complainant, a mango tree belonging to Dhirubhai Naranjibhai is situated. The incident in question took place on September 22, 1995. Before few days of the incident, the complainant had collected the fallen leaves and swept them into a pile under the mango tree belonging to Dhirubhai i.e. appellant no.2 and set them on fire as a result of which, the leaves of the tree belonging to Dhirubhai were singed by flames of the fire. Thereupon, Dhirubhai had quarrelled with Vanitaben and beaten her. The incident of beating was narrated by the complainant to her husband as a result of which, her husband was annoyed and quarrels were, thereafter, taking

place between the deceased and the appellant no.2. On the date of incident, i.e. September 22, 1995, the complainant was cooking food in her house at about 8.00 p.m. but her daughter was not in house. At that time, she realised that a quarrel had taken place between her husband and the appellants. Therefore, she came out of her house and saw that both the appellants were beating her husband. According to her, the appellant no.2 was armed with a pick-axe whereas the appellant no.1 was armed with a stick and both of them were causing injuries to her husband. In order to save her husband from assault mounted by the appellants, the complainant intervened as a result of which, she sustained injury on her ankle, back and left hand. Hearing the hubub, her husband's elder brother Jamsibhai and wife of Jamsibhai came out as a result of which, the appellants fled the place of incident. The complainant found that her husband was not speaking at all and had become unconscious and that he was bleeding profusely from the head. She hurriedly went back to her house and brought water for her husband but her husband could not drink the water. On verification, she found that her husband had expired on the spot. She was a female as well as the only member in the family of the deceased and as it was night time, she sat by the dead body of her husband throughout the night. In the morning, she informed her relatives and thereafter lodged complaint against the appellants at Bardoli Police Station with Mr. Odedara who was then P.S.I. of the Police Station. After registering the complaint, the same was investigated by Mr. Odedara. He visited the place of incident and drew panchnama of the place of incident. He also held inquest on the dead body of the deceased and made necessary arrangements to send the dead body to Primary Health Centre, Vaskui for post-mortem. The Investigating Officer also recorded statements of those persons who were found to be conversant with the facts of the case. The appellants surrendered before the police with their respective weapons and, therefore, necessary panchnama was drawn by the Investigating Officer in presence of panch witnesses. The incriminating articles which were seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, the appellants were chargesheeted in the court of learned Judicial Magistrate First Class, Bardoli for commission of offences punishable under Section 302 read with 34, Section 323 read with 34 and Section 325 read with 34 of I.P.C. As the offence punishable under Section 302 is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Surat for trial where it was numbered as Sessions

3. Necessary charge was framed against the appellants at Exh.6, which was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Kanjibhai Savjibhai Purohit as p.w.1 at Exh.10, (2) Subhashbhai Jaganbhai Choudhary as p.w.2 at Exh.13, (3) Dr. Santoshkumr Siddheshwar Kadwane as p.w.3 at Exh.14, Vanitaben Chandubhai as p.w.4 at Exh.18, (5) Jamsibhai Naranbhai as p.w.5 at Exh.20, (6) Vajuben Jamsibhai as p.w.6 at Exh.21, (7) Mohanbhai Chhitubhai as p.w.7 at Exh.22, (8) Kalubhai Arjanbhai Odedara as p.w.8 at Exh.25 and (9) Dr. Meenakshiben Chhaganlal Desai as p.w.9 at Exh.30 to prove its case against the appellants. The prosecution also produced documentary evidence such as panchnama indicating arrest of the appellants and production of weapons by them at Exh.11, panchnama regarding seizure of clothes of the deceased at Exh.12, post-mortem notes of the deceased at Exh.16, complaint lodged by Vanitaben at Exh.19, panchnama of place of incident at Exh.23, inquest report at Exh.24, certificate of injury sustained by Vanitaben and issued by Dr. Meenakshiben at Exh.31 etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants, the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code. In his further statement, the case of the appellant no.1 was that a false case was filed against him and that he was innocent whereas the claim advanced by the appellant no.2 in his further statement was that he was also falsely implicated by the prosecution. However, no evidence in support of the claim advanced in their respective further statement was adduced by any of the appellants.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was satisfactorily proved by the prosecution that the deceased Chandubhai died a homicidal death. The learned Judge further held that it was proved by the prosecution that some few days prior to the date of incident, Vanitaben had swept the fallen leaves into a pile and set those leaves on fire as a result of which, the leaves of mango tree belonging to the appellant no.2 were singed and, therefore, the appellant no.2 had beaten Vanitaben. The learned Judge further deduced that it was proved by

the prosecution that Vanitaben had, in turn, narrated the incident to her husband who was annoyed and, therefore, a quarrel had ensued in which the appellant no.1 with stick and the appellant no.2 with a pick-axe had assaulted deceased Chandubhai and caused his death. The learned Judge held that it was also proved by the prosecution that Vanitaben had attempted to save her husband and in that attempt, she had received injuries. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Section 302 read with 34, Section 323 read with 34 and Section 325 read with 34 of I.P.C. by judgment dated September 25, 1998 giving rise to instant appeal.

6. Ms. R.V. Acharya, learned counsel of the appellants contended that the testimony of complainant Vanitaben is full of inconsistencies and as her testimony stands contradicted by the contents of F.I.R. lodged by her, her testimony should not have been accepted by the learned Judge of the Trial Court. It was argued that Vanitaben, in her evidence recorded before the court, has stated that the appellant no.2 was armed with an axe and not with a pick-axe, which is referred to in her complaint, which makes prosecution claim, that her husband was assaulted by the appellant no.2 by means of pick-axe, highly doubtful. It was urged that she has admitted in her cross-examination that the fact that the appellants had chased her husband and assaulted him near her house is not stated by her in her police statement and in view of this material omission, her testimony should not have been acted upon by the learned Judge of the Trial Court while fastening criminal liability on the appellants. It was argued that, in fact, her testimony shows that at the time of incident, she was inside her house and busy preparing food as a result of which, she had not seen the incident at all and, therefore, the learned Judge was not justified in placing reliance on her testimony while determining the guilt or otherwise of the appellants. The learned counsel emphasised that no satisfactory explanation is offered by the prosecution regarding late lodging of the complaint as a result of which, the whole prosecution case becomes doubtful and, therefore, the appeal should be accepted. It was further contended that the testimony of Vanitaben, which is full of inconsistencies, is not corroborated by other reliable evidence on record and, therefore, the impugned judgment deserves to be set aside. It was argued that non-mention of names of the appellants as assailants of her husband or her assailants before the Doctor who had treated her makes it evident that she had not seen the incident and therefore, the conviction of the appellants should be set

aside. It was maintained by the learned counsel of the appellants that the names of the appellants were mentioned only on the basis of suspicion but no cogent evidence could be led by the prosecution to establish the charges levelled against the appellants and, therefore, the appeal should be accepted. It was argued that the learned Judge of the Trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be allowed. In the alternative it was argued that having regard to the facts of the case, the offence committed by the appellants would be one punishable under Section 304 I.P.C. and therefore, the appeal should be accepted in part.

7. Mr. I.M. Pandya, learned APP for the State pleaded that the evidence tendered by Vanitaben, who is an illiterate lady, is not only consistent but cogent and, therefore, it is wrong to contend that the learned Judge of the Trial Court was not justified in placing reliance on her testimony. It was argued by the learned APP that the so-called contradictions and/or omissions appearing in the testimony of witness Vanitaben are insignificant as well as inconsequential and do not impeach her credibility at all. It was emphasised that the testimony of witness Vanitaben gets complete corroboration from medical evidence on record regarding injuries sustained by the deceased as well as by her and, therefore, the plea that her uncorroborated testimony should be rejected, should not be accepted by the court. The learned counsel for the State Government argued that the fact that Vanitaben had received injuries is not in dispute and, therefore, her presence at the time and place of the incident can hardly be doubted as a result of which, her testimony should be acted upon by this court. It was pleaded that the production of pick-axe by the appellant no.2 stands fully established by reliable evidence of Investigating Officer Mr. Odedara and as the result of analysis indicates that the pick-axe produced was stained with blood having the same group as that of the deceased, it becomes evident that the appellant no.2 was in close proximity of the deceased when the deceased was fatally wounded, which is a circumstance against the appellants. It was stressed that satisfactory explanation has been offered by witness Vanitaben for late lodging of the complaint and even otherwise, late lodging of the complaint is inconsequential inasmuch as Vanitaben, who was herself injured, would not allow the real assailants to go scot-free and involve falsely the appellants, who were closely related to her in such a serious case. It was argued that the evidence of Vanitaben has inspired confidence of the learned Judge of

the Trial Court who had advantage of observing demeanour of the witnesses and in view of evidence tendered by the prosecution, the charges levelled against the appellants stand fully established. It was contended that non-mention of the names of the appellants as assailants is of little consequence and does not affect prosecution case at all. Dealing with alternative plea, it was argued that in view of evidence of the complainant read with that of the doctor who had performed autopsy, the offence committed by the appellants would be one punishable under Section 302 I.P.C. and not under Section 304 I.P.C. as is sought to be contended by the learned counsel of the appellants. The learned APP pleaded that the learned counsel of the appellants has failed to dislodge convincing reasons recorded by the learned Judge of the Trial Court for convicting the appellants and, therefore, the appeal should be dismissed.

8. This court has taken into consideration the submissions advanced at bar by Ms. R.V. Acharya, learned counsel of the appellants as well as those advanced by Mr. I.M. Pandya, learned APP for the State. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The fact that deceased Chandubhai died a homicidal death is not disputed before this court in instant appeal. Witness Vanitaben, in her testimony before the court, has stated that her husband was assaulted by the appellants with stick and pick-axe respectively. The injuries sustained by the deceased have been enumerated in the inquest report produced on the record of the case at Exh.24. The testimony of Dr. Kadwane would show that he had performed autopsy on the dead body of the deceased on September 22, 1995. The injuries noticed by him, while performing autopsy on the dead body of the deceased, have been enumerated by him in his substantive evidence before the court. Those injuries are also mentioned in the contemporary document prepared by him i.e. post-mortem notes produced by the prosecution at Exh.16. It is nobody's case that the injuries which were noticed during the course of post-mortem examination of the deceased were accidental or self inflicted. Under the circumstances, the finding that it is proved by the prosecution that the deceased died a homicidal death is found to be eminently just and is hereby upheld.

10. In order to prove murder of deceased Chandubhai by the appellants, the prosecution has examined Vanitaben i.e. wife of the deceased as p.w.4 at Exh.18. Her testimony indicates that her deceased husband had three brothers and that all the brothers were in possession of their respective share which was allotted to them by her father-in-law. She has mentioned in her testimony that a mango tree belonging to the appellant no.2 is situated behind her house and that on the date of incident, she had swept the fallen leaves in a pile and set them on fire as a result of which, the leaves of the mango tree belonging to the appellant no.2 were singed. She has mentioned before the court that thereupon, she was scolded by the appellant no.2. It is further claimed by the witness before the court that due to this incident, a quarrel had ensued between her deceased husband and the appellant no.2. According to this witness, the appellants had chased her husband and killed him in front of her house. It is mentioned by this witness in her testimony that the appellant no.2 was armed with an axe whereas the appellant no.1 was armed with a stick and that she had seen the incident when she had come out of her house while cooking the food. It is further claimed by the witness that as her husband was assaulted by the appellants, she had made an attempt to intervene as a result of which, she had sustained injury on her ankle. It is also claimed by her that her husband was beaten in a haphazard manner by the appellants and that she had found that blood was oozing out from the head of her husband. It is also mentioned by the witness that on seeing the incident, she had almost become unconscious. During the course of recording of her testimony, she was shown Muddamal article no.3, which was a pick-axe, and after seeing the same, it was stated by her that at the time of incident, it was dark and she was not able to state positively as to whether the deceased was assaulted with the said pick-axe or not. She was also shown Muddamal article no.4 allegedly used by the appellant no.1 and after seeing the same, it was stated by her that the same was in the hands of her husband's elder brother i.e. appellant no.1 and that the appellant no.1 had beaten her deceased husband with the said stick.

10.1 In her cross-examination, she denied the suggestion made by the defence that it was not stated by her in her complaint that her husband's elder brother as well as younger brother had chased her husband and killed him in front of her house. It was admitted by her that near her house, there are about 8 to 10 trees and because of those trees, darkness was taking place at about 6.00 p.m. to 7.00 p.m. However, the suggestion made by the

defence that because of darkness, she was not able to see as to who had assaulted her deceased husband was emphatically denied by her. The suggestion made by the defence that the appellant no.2 was not armed with a pick-axe was also emphatically denied by her. Similarly, the suggestion made by the defence that she had not witnessed the incident and had come out of her house after the incident was over, was also denied by her. After admitting that the appellants are her husband's elder brother and younger brother respectively, it was stated by her that she had not filed a false complaint against them.

10.2 This is all what transpires from the testimony of witness Vanitaben. A fair reading of the testimony of Vanitaben makes it more than clear that she has narrated the incident in a simple manner. There are no noticeable exaggerations and/or embellishments in her evidence. Though she is illiterate, she has maintained the sequence of incident and narrated the assault which was mounted by the appellants on her husband. In spite of her searching cross-examination, nothing could be brought on record to impeach her credibility. The fact that she had sustained injuries in the incident stands proved by the reliable testimony of Dr. Meenakshiben Desai examined at Exh.30. Dr. Meenakshiben, in her testimony before the court, has stated that on September 22, 1995, she was on duty at Community Health Centre, Bardoli and Vanitaben had approached her at about 6.10 p.m. with a police yadi for her treatment. The doctor has mentioned in her testimony that on examination, she had found that Vanitaben had sustained abrasion on the left hand which was 3 cm long at lower hand. It is also mentioned by the doctor that on external examination, she had found that Vanitaben had sustained a fracture on the right hand at elbow joint. In her testimony before the court, the doctor has specifically stated that the injuries caused were possible by pick-axe and stick which were shown to her during recording of her testimony. In cross-examination, she admitted that if a person dashes with a door in darkness, he is likely to sustain abrasion on left hand. The doctor frankly admitted that she was not able to state positively whether Vanitaben had sustained fracture on her right hand on elbow joint and that she had given the opinion that Vanitaben had sustained fracture of right hand only on external examination. A reasonable reading of testimony of Dr. Meenakshiben makes it very clear that witness Vanitaben had sustained injury in the incident itself. No evidence could be adduced by the defence that on the date of the incident, Vanitaben had dashed against the door and sustained the injuries nor it

was suggested to the doctor that the injuries found on the person of Vanitaben could have been caused by herself. Thus, there is no manner of doubt that the fact that Vanitaben had received injuries in the incident stands fully established. Her presence at the time and place of incident is not in doubt at all. It is well to remember that witness Vanitaben is wife of the deceased and a close relative of the appellants. She, being wife of the deceased, would not allow the real assailants of her husband to go scot-free and would not involve, the appellants falsely who are her close relatives, in such a serious case. If she had been minded to implicate one and all, she would have named Jamsibhai also who is her husband's elder brother but such an attempt is not made at all by her. The so-called omissions brought on record of the case are found to be inconsequential and are not sufficient to impeach credibility of this witness. As her testimony is found to be reliable as well as cogent, this court is of the opinion that the learned Judge of the Trial Court did not commit any error in placing reliance on her testimony while deciding the guilt or otherwise of the appellants.

11. The plea that Vanitaben in her testimony before the court has described pick-axe as an axe which makes her testimony doubtful, cannot be accepted. It may be stated that the prosecution case is that both the appellants had surrendered before the police with their respective weapons. Though witness Kanjibhai Purohit, in whose presence, drawing of panchnama of arrest of the appellants as well as production by them of their respective weapons had taken place, has not supported the case of the prosecution, the fact that the appellants had produced their respective weapons stands fully established by the reliable testimony of Investigating Officer Mr. Odedara. Mr. Odedara, as such, is neither related with nor interested in the deceased or in the complainant nor on inimical terms with any of the appellants and, therefore, he had no reason to falsely state before the court that while surrendering before the police, the appellants had produced their respective weapons. The weapon produced by the appellant no.2 before the police is mentioned to be a pick-axe. It was seized during the course of investigation and produced before the court as Muddamal article No.3. That very pick-axe was sent to Forensic Science Laboratory for analysis and the report of the Analyst indicates that the pick-axe was stained with blood having the same group of blood as that of the deceased. It is nobody's case that during the course of investigation, the pick-axe was substituted by an axe. Therefore, reference made by

witness Vanitaben in her testimony to the axe by mistake as the weapon of offence used by the appellant no.2 will have to be regarded as reference to pick-axe. Reference to axe made by witness Vanitaben is of no consequence and does not assist the case of the appellants at all.

12. The contention that non-mention of names of the appellants as her assailants and assailants of her husband before the Doctor has adversely affected prosecution case cannot be accepted in view of authoritative pronouncement of law by the Supreme Court in (1) PATTIPATI VENKAIAH vs. STATE OF ANDHRA PRADESH [AIR 1985 SC 1715 para 17] and (2) P. BABU AND OTHERS vs. STATE OF A.P. [(1994) 1 SCC 388 at page 392].

13. The contention that late lodging of the complaint is not satisfactorily explained and, therefore, the prosecution case should be disbelieved has no substance at all. The testimony of witness Vanitaben would show that at the time of the incident, she was the only member in her family who was present. Her young daughter was not in house and she herself had received injuries in the incident. Therefore, her claim that because of the incident, she was stunned, deserves to be upheld. It may be mentioned that the incident had taken place during night time and, therefore, there was nothing wrong if she had sat by the dead body of her husband till morning and lodged complaint in the morning after calling her relatives. The late filing of the complaint is satisfactorily explained by the prosecution and has no adverse effect on the prosecution case at all. Even otherwise, late filing of the complaint becomes relevant only if there is possibility that because of enmity, the accused are falsely implicated in the case. As observed earlier, Vanitaben herself was injured in the incident. She, being wife of the deceased, would not allow the real culprits to got scot-free and involve the appellants falsely in the case. Under the circumstances, the plea based on late filing of the complaint has no merits and is hereby rejected.

14. The contention that testimony of witness Vanitaben is not corroborated by other evidence on record and, therefore, the conviction of the appellants should be set aside, has no merits. It is well-settled that conviction in a criminal trial can be based on the testimony of sole witness, if it is otherwise found to be trustworthy and cogent. The Supreme Court has, time and again, explained that it is the quality and not quantity of evidence that matters in a criminal trial and that conviction can be based on the testimony of sole

eye-witness, if it is found to be reliable and cogent. The discussion of testimony of witness Vanitaben made earlier makes it evident that she is a reliable witness. No major contradictions and/or omissions with reference to her complaint could be brought on record so as to impeach her credibility. The illiterate woman has narrated the incident in a simple manner before the court and unfolded the role played by the appellants in the incident. Under the circumstances, her reliable testimony cannot be rejected on the basis that her testimony is not corroborated by other evidence on record. Even otherwise, this court finds that ample corroboration to the testimony of witness Vanitaben is available on the record of the case. Witness Jamsibhai examined by the prosecution as p.w.5 at Exh.20, in his testimony before the court, has stated that a quarrel had taken place between the appellants and his deceased brother Dhiru in which Dhiru had died. Though this witness has stated before the court that he was not knowing as to why quarrel had taken place between the appellants and the deceased, he has maintained before the court that a quarrel had taken place between the appellants and the deceased in which the deceased had lost his life. It may be mentioned that Jamsibhai is elder to the appellants and had no inclination to support the prosecution case fully. Under the circumstances, with the permission of the court, he was permitted to be cross-examined by the the learned APP. In his cross-examination, the witness has admitted that he has good relations with the appellants and that he would not be happy if the appellants were convicted. The admission made by this witness explains the reason as to why he has not supported the prosecution case fully. However, the statement made by him on oath before the court that a quarrel had ensued between the appellants on one hand and the deceased on the other in which the deceased had lost his life, is not challenged by the defence in his cross-examination at all. Where the evidence of a witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. Thus, the reappreciation of evidence of witness Jamsibhai makes it very clear that regarding the main incident itself, he has supported the claim advanced by witness Vanitaben before the court. Therefore, it is not true to contend that testimony of witness Vanitaben is not corroborated by other evidence on record. The testimony of witness Vanitaben gets further corroboration from the fact that the pick-axe produced by the appellant no.2 before the police was stained with blood having the same group as that of the deceased. The find of blood on the pick-axe used by the appellant no.2, having the same

blood group as that of the deceased, would establish that the appellant no.2 was in close proximity of the deceased when the deceased was fatally wounded. This circumstance has not been explained by the appellant no.2, though sufficient opportunity was given to him while recording his further statement under Section 313 of the Code. Therefore, the testimony of witness Vanitaben also gets support from the report of analysis of Serologist and produced on the record of the case at Exh.29.

15. It is relevant to notice that in order to prove the case against the appellants, the prosecution had also examined Vajuben, who is wife of Jamsibhai. During the course of recording of her examination-in-chief, she had not supported the prosecution case and was, therefore, permitted to be cross-examined by the learned APP. In her cross-examination, she has admitted that it was stated by her in her police statement that a quarrel had ensued between her younger sister-in-law i.e. Vanitaben and the appellant no.2 regarding mango tree whereupon the deceased was annoyed and that thereafter, quarrels were taking place between the appellant no.2 and the deceased. Further, she has, in terms, admitted that it was stated by her in her police statement that both the appellants are her husband's younger brothers and it is her wish that they should not be punished. This admission made by her explains as to why she was not inclined to support the prosecution case. On reappreciation of evidence on record, this court finds that the testimony of witness Vanitaben also gets support from other evidence on record.

16. The contention that before the incident had taken place, a quarrel had taken place between the deceased and the appellants as a result of which, the appellants, whilst deprived of the power of self-control, by grave and sudden provocation from the deceased, caused his death and, therefore, the case would fall either under Part I or Part II of Section 304 of I.P.C., has no substance. In spite of searching cross-examination of injured complainant Vanitaben, the defence could not bring on record, the nature of quarrel which had preceded the incident. The deceased was so brutally assaulted by the appellants that an attempt made by the complainant Vanitaben to offer water to him had failed. In fact, the deceased had lost his life on the spot. No evidence is produced on the record of the case on the basis of which the court would be justified in coming to the conclusion that provisions of Exception I to Section 300 are attracted to the facts of the present case. The record of the case would show that the deceased was unarmed

whereas the appellants were duly armed with their respective weapon and had mounted fatal attack on the deceased killing him on the spot. Whether the so-called provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. No facts could be placed before the court by the defence on the basis of which provisions of Exception I can be pressed into service in their favour. The Doctor who had performed autopsy on the dead body of the deceased has stated that injuries found on the deceased were sufficient, in the ordinary course of nature, to cause his death. Therefore clause 3rdly of Section 300 I.P.C. would be attracted to the facts of the case and offence would be one punishable under Section 302 I.P.C. Under the circumstances, the offence committed by the appellants will have to be regarded as one punishable under Section 302 of I.P.C. and not under Section 304 of I.P.C.

17. These are the only contentions which have been raised by the learned counsel of the appellants on their behalf. No other point is urged for consideration of this court in support of the appeal. As the court does not find any substance in any of the grounds urged on behalf of the appellants, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(M.C. Patel, J.)

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